STATE OF MICHIGAN

COURT OF APPEALS

PORTAGE POPLARS, INC.,

Plaintiff-Appellee,

v

MARIAN GOEMAERE,

Defendant-Appellant.

UNPUBLISHED
July 14, 2005

No. 254363
Manistee Circuit Court
LC No. 98-008894-CZ

MARIAN GOEMAERE,

Plaintiff-Appellant,

v

PORTAGE POPLARS, INC.,

Defendant-Appellee.

No. 254364
Manistee Circuit Court
LC No. 98-009154-CZ

PORTAGE POPLARS, INC.,
ROBERT HADEN, MILLIE HADEN,
GORDON BOZANICH, JOYCE BOZANICH,
BONNIE WILKERSON, JANE DAVIDSON,
DAVID EASTRIDGE, PEGGY EASTRIDGE,
RONALD PORTER, CAROLE PORTER,
PAUL LINK, and SUE LINK,

Plaintiffs-Appellees,

V

MARIAN GOEMAERE,

Defendant-Appellant,
and

No. 255619
Manistee Circuit Court
LC No. 94-007368-CZ

GEORGE GOEMAERE and SARAH GOEMAERE,

Defendants.

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

These consolidated appeals regard an ongoing and lengthy dispute between Marian Goemaere (hereinafter "Goemaere"), who owns various parcels of property on Portage Lake in Manistee County, including a marina, and Portage Poplars, Inc. (PPI), along with certain cottagers holding membership certificates and rights in PPI. Numerous court battles have been waged between the parties. Four specific appellate issues are raised in total by Goemaere. First, she argues that the trial court erred in finding her defense to the motion to enforce judgment frivolous, which was the basis for an award of attorney fees. Next, Goemaere argues that the trial court erred in granting PPI an easement relative to the north access of a crescent-shaped driveway that chiefly traverses parcel B, which parcel is owned by PPI. The northernmost section of the driveway briefly traverses parcel A, which parcel is owned by Goemaere. Next, Goemaere argues that the trial court erred in awarding PPI ownership of a fish house located on parcel B. Finally, Goemaere argues that the trial court erred in finding her defense with respect to the fish house frivolous, which was the basis for an award of additional attorney fees. Giving the required deference to the trial court on matters of fact-finding, credibility, and other discretionary decisions, we affirm in part and reverse in part and remand.

In a bench trial, this Court reviews a trial court's findings of fact for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol,* 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C); *Chapdelaine v Sochocki,* 247 Mich App 167, 169; 635 NW2d 339 (2001). When reviewing an equitable determination reached by a trial court, which would include the grant of an easement and an order quieting title, this Court reviews the trial court's conclusion de novo, but the trial court's underlying findings of fact are reviewed for clear error. *Forest City Enterprises, Inc v Leemon Oil Co,* 228 Mich App 57, 67; 577 NW2d 150 (1998). In general, "[f]indings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder,* 239 Mich App 453, 456; 608 NW2d 97 (2000). A trial court's finding that a claim or defense is frivolous under MCR 2.114(F), MCR 2.625(A)(2), or MCL 600.2591 is reviewed for clear error. *In re Costs & Attorney Fees,* 250 Mich App 89, 94; 645 NW2d 697 (2002) ("This Court will not disturb a trial court's finding that a defense was frivolous unless the finding was clearly erroneous."); *Feick v Monroe Co,* 229 Mich App 335, 345; 582 NW2d 207 (1998); *LaRose Market, Inc v Sylvan Ctr, Inc,* 209 Mich App 201, 210; 530 NW2d 505 (1995); *Attorney Gen ex rel Director of Dep't of Natural Resources v Acme Disposal Co,* 189 Mich App 722, 728; 473 NW2d 824 (1991).

With respect to the implied easement, Goemaere argues that it was not necessary to award an easement because there existed an alternate means of ingress and egress for parcel B located to the south, near the public boat launch. "An easement may be created either by a grant or other conveyance or by operation of law." 1 Cameron, *Michigan Real Property Law* (2d ed), Creation of Easements, § 6.5, p 193, citing *Myers v Spencer,* 318 Mich 155; 27 NW2d 672 (1947); *State Highway Comm v Canvasser Bros Bldg Co,* 61 Mich App 176; 232 NW2d 351 (1975). An easement created by operation of law arises because of a supposed grant or reservation between the parties; one example is the implied easement. *Michigan Real Property, supra* at § 6.9, p 198. In *Rannels v Marx,* 357 Mich 453, 456-457; 98 NW2d 583 (1959), our Supreme Court observed the following regarding implied easements:

> "Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case, the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made." [Quoting *Rischall v Bauchmann,* 132 Conn 637, 642, 643 (46 A2d 898, 165 ALR 559)(internal quotations and citations omitted).]
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> "The parties are presumed to have contracted with reference to the condition of the property at the time of the sale, and to have intended that the grantee should have the means of using the property granted, and, therefore, that he should have such rights and privileges in, or over, the premises remaining in the grantor as might be requisite for that purpose.
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> It is a well-settled doctrine of the law of easements that where there are no restrictive words in the grant the conveyance of the land will pass to the grantee, all those apparent and continuous easements which have been used, and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted; and also, all that appear to belong to it, as between it, and the property which the vendor retains; and, hence, when the owner of an entire estate, makes one part of it visibly dependent for the means of access, upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee, as accessorial to the beneficial use and enjoyment of the land." [Quoting *Kamm v Bygrave,* 356 Mich 189, 196.]

For a party to establish an implied easement, three elements must be proven by a preponderance of the evidence: (1) during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) the

easement is reasonably necessary for the fair enjoyment of the property it benefits. *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980).

Regarding the "necessity" element, there is a distinction between easements implied by grant or reservation, in which a requirement is that the easement must be "reasonably" necessary, and implied easements by way of necessity, which require strict necessity, but which do not require prior and apparent obvious use to have existed at the time of severance by the common grantor. *Schmidt, supra* at 732-735 (mere convenience, or even reasonable necessity, not sufficient to show strict necessity if there exist alternative routes, even if alternate routes prove difficult or more expensive); *Michigan Real Property, supra* at § 6.10, pp 201-202. Here, we are concerned with an implied easement by grant, not an easement by way of necessity, and thus only reasonable necessity is required to establish the easement, along with the other two elements cited above from *Schmidt.* In *Schmidt, supra* at 735, a case involving a claim of an implied easement by reservation with respect to a drainage ditch, this Court found that such an easement was established where, although there were several alternative drainage plans available, they would require considerable work and cost. The Court concluded, "Under the facts and circumstances of this case, the effort and expense were great enough for implication of the easement to be reasonably necessary." *Id.*

Goemaere's only argument regards necessity; therefore, it is unnecessary to address the other elements needed to establish an implied easement by grant, although the record does find support for those elements. We would agree that if strict necessity was required, the easement request would fail. However, PPI had only to show that an easement across parcel A was reasonably necessary for the fair enjoyment of parcel B. There was sufficient evidence to support the trial court's ruling. The evidence indicated that blockages and congestion caused by boaters regularly occurred at the south access point down by the public boat launch, especially on weekends and holidays. Backed-up vehicles towing boats to the launch made it difficult at times for PPI members to use the south driveway access. There was also testimony that the south access could become muddy and difficult to traverse in poor weather conditions. We find no error in the trial court's conclusion that access to parcel B and the cottages via the northernmost section of the driveway across parcel A is reasonably necessary for the fair enjoyment of parcel B.

With respect to ownership of the fish house, the evidence established that PPI owns the fish house for the benefit of all its members or cottagers. There is no dispute that the fish house is located on parcel B. Whether coined a fixture to realty or a free standing independent structure, legal title to the fish house passed to PPI on the sale of parcel B, where there was no reservation of rights to the fish house in the land contract, land contract memorandum, or warranty deed. See *Michigan Real Property, supra* at § 4.1; *Wayne Co v Britton Trust*, 454 Mich 608, 610; 563 NW2d 674 (1997) (law of fixtures). The question then becomes whether Goemaere nonetheless had exclusive rights of possession with respect to the fish house by way of her membership rights or certificate giving her possession and control of cottage #5. There was ample support for the conclusion that Goemaere's claim to exclusive possession was undermined by the parties' use of the fish house.

Finally, we address the award of attorney fees with respect to both Goemaere's defense to PPI's ownership claim in regard to the fish house and her defense to PPI's motion to enforce judgment. The trial court's award was predicated on a finding of frivolousness and improper

conduct, with reliance on MCR 2.114, MCR 2.625, MCL 600.2591, and inherent constitutional authority. Goemaere argues that her defenses and positions were not frivolous. MCR 2.114 provides for sanctions where court documents are executed and filed contrary to various implied certifications set forth in the court rule, including certifications that a document is well-grounded in fact, warranted by law, and not interposed for an improper purpose. MCR 2.625(A)(2) provides that "[i]n an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
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> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
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> (3) As used in this section:
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> (a) "Frivolous" means that at least 1 of the following conditions is met:
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> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

It is necessary to evaluate the claims or defenses at issue at the time they were made or raised in determining whether sanctions are appropriate under MCL 600.2591. *In re Costs*, *supra* at 94. "The factual determination by the trial court depends on the particular facts and circumstances of the claim involved." *Id.* at 94-95 (citation omitted). The *In re Costs* Court additionally stated:

> The Legislature chose to make *a* frivolous defense sanctionable. The use of "a" instead of "the" supports the conclusion that the statute, as well as the court rule, does not require that the entire defense or all the asserted defenses be found frivolous in order for sanctions to issue. Rather, sanctions may issue if any defense is frivolous. [*Id.* at 103 (emphasis in original).]

Furthermore, in *Persichini v William Beaumont Hosp*, 238 Mich App 626, 638-640; 607 NW2d 100 (1999), this Court, citing Const 1963, art 3, § 2; Const 1963, art 6, ruled that

Michigan courts have inherent constitutional authority to order sanctions for misconduct by a party or counsel, including attorney fees, even if not expressly set forth in a statute or court rule. The exercise of a court's inherent power may be disturbed only upon a finding that there has been a clear abuse of discretion. *Persichini, supra* at 642.

In regard to the attorney fees relative to the fish house, we find that the court erred in concluding that Goemaere's defense was frivolous. While Goemaere's claim that she owned the fish house had no basis, her claim that she had exclusive rights in it, while ultimately rejected, was not without factual basis.

In regard to the attorney fees relative to the motion to enforce the 1996 stipulated judgment, although there were some actions taken by Goemaere that were arguably within her rights under the judgment, there were others that clearly were not, and there were provisions that she violated. That being said, the court did not err in concluding that Goemaere's motivation and intent was and is to interfere with the rights associated with the boat spaces and slips as held by PPI members. There are only a few years remaining on the lakefront easement. Hopefully, the boating rights can be enjoyed by all concerned. We have thoroughly reviewed the lower court record, and Goemaere's actions can properly be characterized overall as evidencing contempt for the 1996 stipulated judgment, undertaken in spite and lacking good faith. The trial court clearly concluded that Goemaere's primary purpose in not only taking the actions that gave rise to the motion to enforce judgment, but in defending against the motion, was to harass and injure PPI members. Whether under the court rules, MCL 600.2591, or the trial court's inherent constitutional authority to punish misconduct as set forth in *Persichini, supra* at 638-640, we find no basis to reverse the court's imposition of sanctions in the form of attorney fees arising out of the protracted litigation regarding the motion to enforce judgment. Goemaere's conduct can reasonably be viewed as being frivolous as defined in MCL 600.2591, improper, and unwarranted by the facts and law.

Affirmed in part, and remanded for a determination of the fees attributable solely to the enforcement claim. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski